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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-410

COWLES COMMUNICATIONS, INC., *Petitioner*,

vs.

JOSEPH L. ALIOTO, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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I

ARGUMENT

The respondent, Joseph L. Alioto, respectfully opposes the petition for certiorari upon the following grounds:

A. THIS CASE PRESENTS NO INVASION OF PETITIONER'S RIGHTS UNDER THE FIRST AMENDMENT

From the outset in this case, no party has doubted that respondent, a public official and a member of the Bar of this Court, must bear the full burden of proof imposed

by *Times v. Sullivan*. Respondent, plaintiff below, has understood its burden to be proof by a preponderance that the article in question, which was published to eight million people and which clearly concerns the plaintiff, is false and is defamatory, and proof by clear and convincing evidence that the false and defamatory matter was published by petitioner with knowledge of its falsity or in reckless disregard of its truth or falsity.

In both trials of this case, the jury was instructed to find that the linchpin Nut Tree allegations of the article were false. In the first trial, the jury was given general verdict forms and was unable to return a verdict. In the second trial, the jury specially found by a vote of 12 to 0 that the article was false in one or more particulars and also that it was defamatory. The jury hung on the issue of malice.

The first trial judge denied defendant's successive motions for summary judgment, directed verdict, and judgment n.o.v., all based on malice. The second trial judge denied a renewed motion for summary judgment, but granted defendant's motion for judgment n.o.v. In so doing the trial Court stated that its view of the matter was subjective, and that another judge might see the interplay of the facts differently, and that plaintiff had presented evidence from which the jury reasonably could find malice by clear and convincing evidence. (Petition, Appendix B, pp. 9-10). That is, the second trial judge held after trial that while the case was one for the jury, he would not have found for plaintiff in a judge-tried case. Ibid.

In reversing the ensuing judgment, the Ninth Circuit has also found from its review of the evidence that the

evidence is sufficiently strong to support a finding of malice by clear and convincing evidence. (Appendix A, p. 8).

Hence, two trial judges and the Court of Appeals have examined the evidence of malice and found it sufficient for submission to a jury.

Briefly, the evidence of malice is as follows. The Nut Tree meetings were related to the authors by the son-in-law, Thomas, of one of the Mafia figures in the story. (C.Tr. 2032; Tr. 1439).[1] Thomas did not claim to have attended any of the meetings, and had never seen plaintiff except on television, but was the sole source of the Nut Tree allegations. (Tr. 1442). He also related to the authors Mafia connections of three other nationally known politicians. (Tr. 1403). Thomas was a person of exceedingly low moral character, according to the information which Thomas had given to the authors. (Plaintiff's Exhibits 2, 4). Also, he successfully evaded subpoenas for both trials.

In a long interview with the plaintiff prior to publication and after the Thomas revelations, the authors did not ask whether plaintiff had attended the alleged Nut Tree meetings. At the interview plaintiff told the authors in answer to their questions that he had never met or heard of Bompensiero or La Porte, who are described in the article as a killer and a racketeer, respectively. (Tr. 377-382). Nonetheless, the article depicts plaintiff as a confederate of these two at the secret meetings.

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[1] "C.Tr." refers to the Clerk's Transcript; "Tr." refers to the Reporter's Transcript.

The article states that plaintiff's name appears in dozens of law enforcement intelligence reports. Plaintiff, of course, has no criminal record. (Tr. 1002-3). The publisher testified that he had never seen any such report, and no such reports were produced at trial. (Tr. 1943-45).

The article tends to characterize separate attorney-client relationships between plaintiff and Emelio Giorgetti and plaintiff and Salvatore Marino as Mafia relationships. (C.Tr. 614-617).

A great mystery in the case is why the F.B.I. granted to the young authors some 13 interviews between April and September, 1969, and made files and records available to them. An F.B.I. agent, Herbert Mudd, testified at the trial that he had been deceived by the young authors, and believed that they were writing a story about James Fratianno, who appears in the article.

There is other evidence of malice. The article omits any material which would permit the reader to conclude that the Fratianno loans from the First San Francisco Bank were normal commercial transactions and not the result of a Mafia cabal, even though such material was in the authors' notes. (Tr. 2709). Thus, the authors omit from the story the fact that Fratianno received greater loans from other banks, without any intervention of the plaintiff, before receiving a loan from First San Francisco Bank. (Tr. 2759).

While the plaintiff had an interview with the authors, there was none with responsible officers of the defendant publisher, despite plaintiff's repeated requests for an interview. (Tr. 359-78). The article purports to relate plaintiff's conduct over a period of decades and was not

hot news. The only urgency to publish the article would have come from a desire to have the article appear shortly before a fund raising dinner for plaintiff, which dinner is mentioned in the second to last paragraph of the article.

Defendant has stated by interrogatory answer that it does not believe that plaintiff is a member of the Mafia, has committed any criminal act or has furthered any criminal purposes of the Mafia. (C.Tr. 785; Tr. 1403, 1932-4, 2663). The article as a whole is contra.

At the time of publication of the article, Look, like the Saturday Evening Post in the *Butts* case, was in the advanced stages of collapse. (C.Tr. 1669; Tr. 623-4).

It is submitted that there is ample evidence of reckless disregard and intentional falsehood in the record, and that in the prior proceedings in this case defendant's rights under the First Amendment have been carefully observed, including review of the evidence by the Ninth Circuit and the District Judges.

B. THE ASSERTED CONFLICT IN THE CIRCUITS IS ILLUSORY

A concurring opinion in *Wasserman v. Time, Inc.*, 424 F.2d 920 (D.C. Cir.), *cert. denied* 398 U.S. 940 (1970), entirely dicta, states that in a First Amendment libel case the judge must find malice in the same sense that he would make such a finding in a judge-tried case, before the matter may be submitted to the jury, or in order for a plaintiff's verdict to be upheld. Under this approach, the plaintiff would prevail only if the judge finds in his favor and the jury does also. If the judge would find for

plaintiff, but the jury does not, defendant prevails. If the judge would find for defendant, the case is not submitted to the jury, even though the judge agrees that reasonable men might find for plaintiff.

This complicated formula was dicta in the case in which it was announced and has not been followed in any other case known to respondent. In *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 at pp. 864-6 (5th Cir. 1970), the Court cited and quoted the "two-step" language of *Wasserman v. Time, supra*, but adhered to the traditional and more even-handed standard of review:

> "We are convinced that Bon Air has not presented issues of fact from which a jury could find that Time published the article with actual knowledge of its falsity or with a reckless disregard as to whether or not it was false.[21]"

The footnote reads:

> "[21]The following statement by Judge Tuttle in *McLaney* [Time, Inc. v. McLaney, 5 Cir., 1969, 406 F.2d 365] seems pertinent here:
>
> 'Where * * * it is plain that the record has been fully developed by depositions and affidavits on a motion for summary judgment, and such record demonstrates that, construing all of the facts and inferences to be drawn therefrom in favor of the party against whom the judgment is entered, he would not be entitled to have a jury verdict stand, we have not hesitated to hold that the grant of summary judgment is proper,' 406 F.2d at 571-572."

Similarly in *Vandenberg v. Newsweek, Inc.*, 507 F.2d 1024 (5th Cir. 1975) and *Baxter Berry v. National Broadcasting Company, Inc.*, 480 F.2d 428 (8th Cir. 1973), *cert.*

denied 418 U.S. 911 (1974), the Courts merely found upon their review of the evidence that it would not support a jury verdict for plaintiff. These cases do not conflict in principle or rule of law with the case at bar, where the Court of Appeals and two trial judges have held that the evidence of malice is sufficiently strong to support a jury finding in plaintiff's favor.

C. THIS CASE PRESENTS NO ISSUE UNDER ERIE v. TOMPKINS

One reason for the *Erie* doctrine is uniformity of substantive rules of law in the state court and in the federal diversity court. *Hanna v. Plumer*, 380 U.S. 460 (1965). In interpreting the California retraction statute and the recent case of *Montandon v. Triangle Publications*, 45 Cal. App.3d 938 (1975), in which counsel for petitioner in the case at bar represented the publisher, the Ninth Circuit in the case at bar has clearly adhered to the same rule of law which would be applied if this case were pending in the state system.

D. THE JUDGMENT OF THE NINTH CIRCUIT IS NONFINAL AND INTERLOCUTORY

This action has been remanded to the District Court for trial on the issue of malice alone. If defendant prevails, the issues which it now asks this Court to review will become moot. If plaintiff prevails, issues now raised in the instant petition may be reviewed on a subsequent petition in this Court. *Hamilton-Brown Shoe Co. v. Wolf Brothers Company*, 240 U.S. 251 at p. 258 (1915).

II

CONCLUSION

The democratic process is not served by defamatory falsehoods. Here the evidence will support a finding that defamatory falsehoods about plaintiff were published with knowledge of their falsity. The Constitution should accord no protection to deliberate lies or reckless publication of defamatory falsehood.

The petition should be denied.

Dated, October 8, 1975.

Respectfully submitted,

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